Supreme Court, U.S.
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No. 94-970

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JACK B. BUSTER

Petitioner

v.

THOMAS, HEAD & GREISEN EMPLOYEES TRUST; RONALD E. GREISEN; HENRY P. HEAD

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

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SUPREME COURT RULE

Supreme Court Rule 10 4

I. APPLICABLE STATUTES AND REGULATIONS

This case involves 29 U.S.C. § 1002(21)(A)(ii) and 29 C.F.R. § 2510.321(c)(i) (1992) which set forth the factors for determining when a person is a fiduciary with respect to a trust established under the Employee Retirement Income Security Act (ERISA).

Petitioner Buster's citation to 29 U.S.C. §§ 1002(14)(A), 1106(a)(1), 1109(a), and 1131 is erroneous because Buster's questions in this case present no controversy which makes them applicable.[1]

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[1] These sections of ERISA and Buster's arguments appearing at 22-24 of his petition, with respect to parties in interest and prohibited transactions do not relate to issues in this case. Buster relies on these statutes and arguments in a retaliatory action Buster recently commenced against Ronald Greisen and others in state court, which action was removed to the United States District Court for the District of Alaska. See Buster v. Greisen, No. A94-0475 CV (JKS) (D. Alaska, Dec. 14, 1994) (Order Denying Remand Attached as Appendix). Of course, this Court should not consider the arguments while they are pending before a United States District Court.

II. STATEMENT OF THE CASE

Petitioner Jack Buster is dissatisfied with the trial court's findings of fact and the affirmation of those findings by the United States Court of Appeals for the Ninth Circuit. See Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114 (9th Cir. 1994). Therefore, Buster seeks a second appellate review of factual determinations.

District Court Judge von der Heydt for the District of Alaska determined that Petitioner Buster was a fiduciary within the meaning of ERISA by articulating findings of fact relating to each of the five factual elements of fiduciary status expressed in 29 U.S.C. §1002(21)(A)(ii) and 29 C.F.R. 2510.3-21(c)(1) (1992). The trial court also found Buster had breached his fiduciary duties by making "untrue statements of material fact" and "misrepresentations" in connection with the sale of notes secured by unique parcels of real estate to the trust. The court of

appeals concurred in these factual determinations. These facts compel the result obtained below.

III. SUMMARY OF ARGUMENT

None of the special and important reasons which sometimes warrant a grant of a writ of certiorari exist in this case. In resolving this dispute, the trial court was not required to construe ambiguous statutory language or to inquire into the intentions of Congress in enacting ERISA. The trial court was not required to navigate uncharted legal waters or make legal rulings which affect the general public as opposed to the parties to this dispute.

By affirming the decision of the trial judge, the court of appeals did not construe or interpret ERISA and did not make rulings of law which conflict with courts of appeal for other circuits as Petitioner contends.

Other courts of appeal have affirmed

findings of fact made in the context of distinct relationships that a person or entity was not a fiduciary within the meaning of ERISA. However, these decisions do not reflect an inter-circuit conflict in the interpretation of ERISA. Rather, they confirm the factual nature of the questions presented and reflect the different results the differing facts required. The factual dispute presented by Buster's petition simply does not merit review by this Court.

IV. ARGUMENT

A. Factual Disputes Merit No Review By This Court.

Only very special cases merit this Court's discretionary review on writ of certiorari. Supreme Court Rule 10. This dispute is not a special case.

Early this century, this Court dismissed a writ issued to the Ninth Circuit as improvidently granted when it found after

careful review that there was no real conflict between the circuits, but rather distinct facts requiring different results:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). Similarly, this case merits no review.[2]

Petitioner presents this Court with five

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[2] Even assuming arguendo this case created a conflict among circuit courts of appeal, this is not a case in which principles were announced of importance to anyone except the litigants in this case which resulted in a judgment in an amount less than $150,000, exclusive of interest and costs. In such circumstances, denials of certiorari are often issued in spite of an apparent conflict between circuits. See Beaulieu v. United States, 497 U.S. 1038 (1990).

questions of fact labeled "legal conclusions." The questions presented are not questions of law.[3] Rather, they articulate the five factual elements which must be addressed to determine whether a person has acquired fiduciary status within the meaning of 29 U.S.C. § 1002(21)(A) by rendering investment advice for a fee or other compensation.[4]

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[3] In his brief as appellant to the United States Court of Appeals for the Ninth Circuit, Buster presented these same questions to the court as questions of fact and argued in conclusion that the "district court's finding that Northern Financial and its partners became fiduciaries to the trust by rendering investment advice for a fee as a primary basis for investment decisions by the trustees is clearly erroneous." Brief of Jack B. Buster, Appellant at 48, Thomas, Head & Greisen v. Buster, 24 F.3d 1114 (9th Cir. 1994) (No. 92-36732). Buster's attempt to invoke a new standard of review at this stage in the proceedings is disingenuous. As discussed more fully below, the decisions upon which Petitioner relies affirm that the questions Petitioner presents are questions of fact.

[4] In the proceeding below, the courts considered the facts in light of the follow-

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ing statutory and regulatory language:

29 U.S.C. 1002(21)(A) provides in part:

> (21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent . . . (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . .

29 C.F.R. 2510.3-21(c)(1) (1992) provides:

> (c) Investment advice. (1) A person shall be deemed to be rendering "investment advice" to an employee benefit plan, within the meaning of [29 U.S.C. § 1002(21)(A)(ii)] only if:
>
> (i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and
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> (ii) Such person either directly or indirectly (e.g., through or together with any affiliate) --
>
> (A) Has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to

All five questions presented to this Court were resolved in July 1992 by District Court Judge James A. von der Heydt after careful consideration of evidence presented at trial.[5]

> purchasing or selling securities or other property for the plan; or
>
> (B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan . . . that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

[5] The court of appeals affirmed each of the findings of fact relating to Buster's fiduciary status concluding that many were "well supported by the evidence." Buster, 24 F.3d at 1120. The findings were as follows:

Findings re Fiduciary Status of Defendants.

1. Defendants rendered investment advice to the Trust as to the value of the Falkenstein, Kern, Bergin and Smith notes by virtue of their having presented yield sheets, mortgage analyses, purchase prices and other information to trustee Ronald E. Greisen.

2. Defendants made recommendations as to the advisability of the Trust investing in the Falkenstein, Kern, Bergin and Smith notes by virtue of defendants' investigation into and screening of those notes by applying the investment criteria previously articulated to them by trustee Ronald E. Greisen, and by subsequently presenting those notes to the Trust with a recommendation to purchase them.

3. Defendants rendered investment advice to the Trust on a regular basis as evidenced by the Trust's purchase of 61 notes over a nine and one-half year period.

4. Defendants rendered investment advice to the Trust pursuant to a mutual understanding that Defendants' advice would serve as a primary basis for the investment decisions of the Trust, and that defendants' advice would be individualized investment advice based on the particular needs of the Thomas, Head & Greisen Employee

Trust, concerning such matters as the Trust's investment policies or strategies, overall portfolio composition or diversification of plan assets. Defendants' advice served as a primary basis for the Trust's investment decisions. In the course of Northern Financial's dealings with the Trust, the Trust invested approximately 40% of its total assets in investments recommended by defendants. The advice rendered by defendants was individualized to the Trust based on its particularized needs. Mr. Greisen personally met with the defendants and discussed the need for diversification of plan assets, both geographically and by asset type, as well as the overall investment strategy of the Trust. Mr. Greisen articulated parameters for Trust investments, and defendants were aware of what types of investments were suitable for the Trust. Defendants used the Trust's investment parameters to investigate and screen such notes before they were recommended to the Trust.

Defendants understood that the trustees were relying on them to investigate and screen such notes, and to present only suitable opportunities to the Trust.

Defendants' compensation amounted to thousands of dollars on each of the notes in question; it is unreasonable to assume that Mr. Greisen and Mr. Head would agree to

compensation in that amount unless they understood that defendants were providing a substantial service to the Trust in return.

5. Mr. Buster was also a fiduciary to plaintiffs by virtue of his being a general partner, and they being limited partners, in Kavik Mortgage Investors. The court concludes that any reasonable person, when dealing with another who serves two different masters, only one of which is owed a fiduciary duty, would not proceed before ascertaining which entity he was purporting to be representing.

6. Defendants received compensation for rendering investment advice to the Trust. The price of the notes offered to the Trust were fixed by defendants to yield a 20% return to the Trust on its invested funds.

7. In late April or early May of 1986, defendant Jack B. Buster was aware that the Falkenstein, Kern and Smith notes had been sold to the Trust by Northern Financial. Mr. Buster considered these notes unsuitable investments for the Trust. In a conversation with Mr. Greisen, Mr. Buster expressed his surprise that the Trust had purchased the notes in question.

At that time, Northern Financial had a fiduciary duty to advise the Trust that the notes in ques-

The court of appeals considered Buster's claim that each of the findings was erroneous and affirmed each finding. Buster, 24 F.3d at 1120.

Facts established by a district court and concurred in by a court of appeal merit no review by the Supreme Court.

> A court of law such as this court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of facts by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Manufacturing Co. v. Linde Co., 336 U.S. 271, 274-275 (1949) (citing cases).

In Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987), this Court reviewed issues relating to the discriminatory intent required to prove a civil rights claim and

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> tion were not suitable investments for the Trust, and the reasons for such a conclusion.

See Petition for Writ of Certiorari at A55-A58.

upheld findings that the parties had discriminated on racial grounds in violation of statute. This Court noted that:

> The court of appeals did not set aside any of the district court's findings of fact that are relevant to this case. That is the way the case comes to us, an both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task.

Id. at 665. See also Rogers v. Lodge, 458 U.S. 613, 623 (1982); Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967).

The resolution of the dispute in Goodman, involving the trial court's findings of historical fact and application of statute to those facts, reflects the same process which occurred in the present case. Buster's petition invites this Court to undertake the same review of the record and reconsideration of the evidence the Court declined in Goodman. The findings of fact in this case, noted above, made by District Court Judge von

der Heydt, stand unassailed as affirmed by the court of appeals. Buster has presented this court with no reason for reviewing or disturbing these facts.[6]

B. No Inter-circuit Conflict Exists.

Petitioner contends that the decision below conflicts with decisions of other United States Courts of Appeal. No conflict exists.

Farm King Supply, Inc. v. Edward D. Jones & Co., 884 F.2d 288 (7th Cir. 1989),

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[6] Occasionally, without elaboration, Buster argues that affirmation of the findings of the trial court required the court of appeals to "construe ERISA." (See Petition at 26, 32) Buster does not develop this argument because he cannot. Neither the trial court nor the court of appeals were called upon to interpret ambiguous statutory or regulatory language to resolve this dispute. Buster's arguments present none of the analysis of statutory language which mark cases involving statutory construction. Compare, e.g., McElroy v. United States, 455 U.S. 642, 643 (1982); Shapiro v. United States, 335 U.S. 1, 4 (1948). Buster's argument rests entirely on comparisons of this decision with other court decisions, which decisions the Ninth Circuit appropriately distinguished on their facts.

upon which Petitioner primarily relies, demonstrates the factual nature of the present dispute and supports the conclusion no further review of this case is warranted.

In Farm King, trustees of an ERISA trust argued that a brokerage firm was a fiduciary because it rendered individualized investment advice pursuant to a mutual agreement and received compensation therefore. 884 F.2d at 293. Analyzing this argument, the Seventh Circuit applied the definition of a fiduciary expressed in 29 U.S.C. § 1002(21)(A)(ii) and the "unassailed regulations further explaining when a person is deemed to be providing investment advice." Id. at 291. The court made no further analysis of the controlling statutory and regulatory language. Recognizing the fact intensive nature of the dispute, the court of appeals affirmed the decision of the trial court applying a clearly erroneous standard of review.

As in this case, the appellants in Farm

King argued that the findings of the district judge with respect to the elements of fiduciary status were mixed findings of fact and law which warranted de novo review. Id. at 293. The court rejected this argument as follows:

> [W]hether the parties agreed that Jones would provide investment advice which would be the primary basis for investments, turns on the evidence heard at trial. Did the parties have such an agreement? The issue here is comparable to the corresponding "meeting of the minds" component of contract cases. Whether a meeting of the minds exists is an issue for the trier of fact. Consequently, the finding in question made by the district judge is solely a factual matter and thus reversible only upon a showing that the determination was clearly erroneous.

Id. at 293 n.6 (citations omitted).

The trial court determined that there was no mutual understanding as required by ERISA. Because this determination was supported by the record, the court of appeals affirmed the decision. Id. at 293-94. See also Consol. Beef Indus., Inc. v. New York

Life Ins. Co., 949 F.2d 960, 965 (8th Cir. 1991), cert. denied, 112 S.Ct. 1670 (1992) (affirming trial court's factual determination whether entity was a fiduciary within the meaning of ERISA).

In the same way, the Ninth Circuit in this case appropriately concurred in the trial court's findings of fact which controlled the results in this case. As is clear from the findings in this case of District Judge von der Heydt noted above, the relationship between Jack Buster and the Thomas, Head & Greisen Employees Trust was different from the relationships analyzed in Farm King and the other decisions relied upon by Buster. The distinct facts regarding these different relationships simply call for different results.

V. CONCLUSION

Petitioner Jack Buster argued before the court of appeals that the facts found in this

case were clearly erroneous. Buster did not prevail. Buster now brings the same argument to this court attempting to disguise questions of fact as questions of law. Buster's argument that a conflict exists between courts of appeal lacks merit because the decisions merely reflect the different results required by distinct facts.

The findings of fact made in this case compel the result obtained below. Petitioner has presented this Court with nothing which

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merits further review. Mr. Buster's petition should be denied.

RESPECTFULLY SUBMITTED this 27TH day of December, 1994.

BLISS & WILKENS
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MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Jack Buster v. Ronald Greisen, et al.
Case No. A94-0475 CV (JKS)

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Marvel Hansbraugh,
Case Management: 271-5575*

PROCEEDINGS: ORDER FROM CHAMBERS

Thomas, Head & Greisen Employees Trust (the "Trust") sued Jack Buster in Federal Court pursuant to the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. § 1001, et seq. This Court had federal question jurisdiction. 28 U.S.C. § 1331. The Trust argued that Buster, a fiduciary under the Act, had fraudulently induced the Trust to acquire certain assets. See 29 U.S.C. § 1109(a) (making fiduciaries personally liable for inter alia fraud). The Act, which the Supreme Court has described as a, "comprehensive and reticulated statute", see Nachman Corp. v.

PBGC, 446 U.S. 359, 361 (1980), with, "six carefully integrated civil enforcement provisions", Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985), was intended to provide a comprehensive system of civil recovery for those defrauded by fiduciaries. See, e.g., Mertens v. Hewitt Associates, 113 S.Ct. 2063 (1993). Judge Von Der Heydt of this Court heard evidence and found in favor of the Trust, concluding that Buster had defrauded it in numerous particulars. He awarded judgment against Buster in the sum of $142,745.71. This judgment was affirmed on appeal. Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3rd 1114 (9th Cir. 1994).

Thereafter Buster commenced this action in State Court against three of the plaintiffs in the federal court case: Ronald E. Greisen, Henry P. Head, and David L. Ratchye. In this action Buster argued that Greisen and the others failed to disclose to him that his actions

made him a fiduciary under federal law who could be used in federal court for fraud. Failure to advise him regarding his duties under federal law, Buster continues, lead to his being successfully sued in federal court and having a judgment rendered against him. He seeks recovery for the costs and attorney's fees he incurred in federal court, the amount of the judgment against him, plus damages for injuries to his reputation from being branded a crook in federal court. He asks for $1,000,000.

Greisen and the others removed this case to federal court. 28 U.S.C. § 1441(b). Buster seeks a remand. Docket No. 7. He argues that his action is purely one of state law founded on Restatement (Second) Torts § 551 (1977). See Turnbull v. LaRose, 702 P.2d 1331 (Alaska 1985). In context, it appears that Buster is really suing for a variation of abuse or process; he is being dragged into court and required to defend and incur costs

and the damage to his reputation from losing the lawsuit which constitutes his damages. Generally, this Court would not have removal jurisdiction over an action for abuse of process or malicious prosecution even if the process allegedly abused was the process of this Court. See, e.g., Tarkowski v. County of Lake, 775 F.2d 173 (7th Cir. 1985); Fisher v. White, 715 F. Supp. 37 (E.D. N.Y. 1989); Owens v. First City Nat. Bank of Beaumont, 714 F. Supp. 227 (E.D. Tex. 1989); Voors v. Nat. Women's Health Organization, Inc., 611 F. Supp. 203 D.C. Ind. 1985). An exception to this rule exists where the original plaintiff sued on a cause of action expressly granted by Congress and the state court suit attacks that action. See, e.g., Nationwide Charter and Conventions, Inc. v. Garber, 254 F. Supp. 85 (D. Mass. 1966). In such a case there is a real risk that a litigant will use state process as a means of retaliation against the bringing of an action expressly authorized by

Congress. To permit such an action to proceed in state court would seriously jeopardize this Court's power to grant relief to litigants pursuing ERISA remedies under federal law. Consequently, federal common law provides a defendant in such a suit a federal remedy in order to protect and vindicate his Congressionally granted statutory rights and this Court has jurisdiction under 28 U.S.C. § 1331.

In order to prevail, Buster must convince a court that the Trustees of an ERISA trust are under an obligation to inform potential swindlers of their obligations under federal law or suffer the cost and expense of state court litigation where the trustee successfully sues the swindler in federal court.[1] Such potential law suits could not help but

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[1] My decision in this case makes it unnecessary to determine whether Buster's current claims were compulsory counterclaims in the Trust's federal court action against him. See Fed. R. Civ. P. 13(a).

chill reliance on the remedies established by Congress in 29 U.S.C. § 1132(a)(2). In such a case, the federal common law should provide a remedy to protect ERISA from retaliatory lawsuits. Under the circumstances, 29 U.S.C. § 185(a) provides this court with jurisdiction. See, e.g., Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). Alternatively, this Court would have jurisdiction under 28 U.S.C. § 1331, since the common law would provide a federal remedy for retaliatory lawsuits of this kind brought in state court.[2]

IT IS THEREFORE ORDERED:

The motion for Remand and for Costs at **Docket No. 7 is DENIED.**

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[2] The close nexus between the chilling effect permitting lawsuits like Buster's to proceed in state court would have on the remedies set out in 29 U.S.C. § 1132 serves to distinguish this case from the general rule that there is no federal law regarding abuse of process. See, e.g., Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963).

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge, by Ardel Burritt, secretary to Judge Singleton.

DATE: December 14, 1994

SECRETARY'S INITIALS: ab

* ALL INQUIRIES REGARDING THE SCHEDULING OR CALENDARING OF THIS CASE SHOULD BE DIRECTED TO THE ABOVE-INDICATED CASE MANAGER.

C.F. No. 1